ABORIGINAL ISSUES TODAY

A legal and business guide

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INTERNATIONAL LAW AND ABORIGINAL DISPUTES

by Peter W. Hutchins and Carol Hilling

There is nothing radical in suggesting international law is applicable to many Aboriginal issues. Indeed, much of the Canadian law about Aboriginal people is based on international law. Francisco de Vitoria, one of the founders of modern international law, argued in the 16th century that indigenous peoples were the true owners of their lands, with full control in their public and private matters. Chief Justice Marshall of the U.S. Supreme Court in the early 19th century acknowledged the relevance of the law of nations when he attempted to extract the legal principles applicable to Aboriginal-European relations.

Marshall elaborated the law about the sovereignty of North American Indians, including what sovereignty they had left after they signed treaties surrendering their territory. The Indian Nations were considered limited in their external sovereignty but maintained sovereignty over their own people. Marshall characterized the Indian Nations as "dependent allies" and "domestic dependent nations." Yet he emphasized that their being domestic dependent nations did not involve their giving up their national character: "Protection does not imply the destruction of the protected."

In the 19th and early 20th centuries, international law began to legitimize the denial of Aboriginal sovereignty and Aboriginal rights. This approach unfortunately still conditions the

thinking of far too many lawyers who perhaps have not bothered with the matter since law school (if then) and the majority of state politicians who take comfort for self-serving purposes in notions of European superiority and state sovereignty.

But recently, the direction of international law has shifted back to human values of the world community and away from the monopoly of state conduct, and the focus is increasingly on the rights of indigenous peoples in international law. International law is rediscovering its original path with the drafting of documents such as the U.N. Draft Declaration on the Rights of Indigenous Peoples and the adoption of treaties such as the I.L.O. Convention 169, as well as treaties on environmental protection.

a. INTERNATIONAL LAW AND ABORIGINAL DOMESTIC LITIGATION

Why should Canadian lawyers and courts involved in Aboriginal litigation consider international law? The simple answer is that international law is part of the law that applies to Aboriginal issues. Bluntly, it is not necessary to establish state sovereignty or international treaty status of Crown-First Nation treaties in order to use international law to support the legal positions being argued by First Nations.

1. International law as part of Canadian law

(a) International treaty law

International treaties are difficult to invoke before Canadian courts since Canada incorporates few treaties into Canadian law. These treaties must be incorporated by legislation to have legal effect in Canada, and the legislation must be enacted by the legislature with jurisdiction over the subject matter of the treaty. However, often the rules written in the treaties reflect *customary rules* of international law which may be invoked before the courts.

(b) Customary international law

Customary international law consists of rules deriving from state practice. When many states from various parts of the world adopt a certain practice and demonstrate that they feel obligated to act in this way, the practice results in customs that become compulsory for every state, even if they are not written in a treaty. Since Canada incorporates few of the international treaties it ratifies, customary law can provide a useful alternative.

Although there is some confusion and uncertainty in Canadian law about the application of customary international law, it can be argued that it applies as part of Canadian law to the extent that it does not conflict with statutory law. This argument is supported by a number of court decisions and has been adopted by the Supreme Court of Canada. Customary international law has been invoked on several occasions in Aboriginal litigation. For example, Aboriginal parties often refer to the rules of interpretation of international treaties in cases about Indian treaties. Although these rules are applied by the courts, judges do not feel bound by them.

2. Can international law help interpret statutes?

One principle of statutory construction is that parliament is presumed not to purposely violate international law when it creates statutes, even where international law does not apply directly in Canadian law. Therefore, if there is any ambiguity in the interpretation of a statute, the courts will favor an interpretation that respects Canada's international obligations. On the other hand, when a statute *clearly* contradicts international law, Canadian courts will follow the provisions of the statute, regardless of violating Canada's international obligations.

According to several court decisions, there is a rule that if legislation intends to override Canada's international obligations, it must do so very clearly and unambiguously. There

is no reason this rule should not apply equally to the interpretation of common law — the law that recognizes the existence of Aboriginal rights.

b. HOW INTERNATIONAL LAW INFLUENCES CANADIAN LAW AND ABORIGINAL ISSUES

International law can be applied by analogy usefully to Aboriginal issues. In *Simon v. The Queen*, a 1985 case examining the 1752 Treaty of Peace and Friendship between the Mi'kmaq and the British, the Supreme Court of Canada broke the judicial ice on applying international law in Canadian Aboriginal domestic litigation.

In 1929, the County Court of Nova Scotia held that the treaties with the Indians of that province were not international since they were made between independent powers and the Indians were never considered one. Since only what the judge called "constituted authorities of nations" had authority to make treaties, he concluded that the Treaty of 1752 between the Mi'kmaq and the British was not a treaty.

In *Simon*, the Supreme Court of Canada rejected this conclusion, saying not only that such language was incompatible with Canada's growing awareness of Aboriginal rights but also was inappropriate in Canadian law. The court said that the Indians *did* have the capacity to enter into treaties: "An Indian treaty is unique, it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."

This statement by Chief Justice Dickson, now the law in Canada, has been taken to mean that Indian treaties are not international treaties and that international law does not apply to them. However, the criteria Dickson applied in reaching his conclusion are identical to those prevailing under international law. He recognized, for example, that under certain circumstances a treaty could be terminated if one of its fundamental provisions is breached. This is a rule of

international law codified in the Vienna Convention on the Law of Treaties. It seems, therefore, that Canadian courts should not limit themselves to applying only one set of principles but should look to any pertinent source, including international law.

Australian law has recently been given this direction by the High Court of Australia. In *Mabo v. Queensland*, the court recognized the important influence of international law on the development of the common law.

Mabo has already found its way into Canadian case law through the decision of the British Columbia Court of Appeal in *Delgamuukw v. The Queen*. The Court of Appeal solicited oral and written submissions from all counsel on the significance of *Mabo*. Two of the judges quoted extensively from the judgment in their reasons.

The Crown-First Nation treaties were used to establish rights of access to territory and resources, military alliances, and commercial relationships. The language of these documents was not the language of domestic contracts between the Crown and its citizens but of treaties between independent peoples, albeit of uneven strength. As Chief Justice Marshall of the U.S. Supreme Court noted in *Worcester v. State of Georgia* in 1832, the words "treaty" and "nation" were given the same meaning by the European powers whether applied to Indian Nations or to any other nation in the world. Marshall referred specifically to international law in describing the treaty relationship, and the court noted that the parties did not need to be equal to apply international law:

> What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government. Is it essential that each party shall possess the same attributes of sovereignty, to give force to the treaty? This will not be pretended: for, on this ground, very few valid treaties could

> be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.

International law from 1750 to 1850 did not emphasize formal statehood. The British Crown made treaties with many different kinds of parties, in many different circumstances. Almost 160 years later, a unanimous Supreme Court of Canada echoed its 19th-century U.S. counterpart, confirming, in *Sioui*, that the Crown-First Nation treaties indicate that the Crown considered Indian Nations independent nations.

c. USING INTERNATIONAL FORUMS TO RESOLVE ABORIGINAL DISPUTES

Although access to international forums to resolve Aboriginal disputes is limited, there are some avenues Aboriginal peoples in Canada should consider.

1. International Court of Justice

The United Nations' court, the International Court of Justice (ICJ), is in The Hague, Netherlands. Neither individuals nor groups can bring a case before the court, only states. However, the ICJ can advise on legal issues presented by the U.N. General Assembly or the Security Council. Any other U.N. organization, such as the U.N. Commission on Human Rights (see below), may seek the opinion of the Court if authorized by the General Assembly.

2. U.N. Commission on Human Rights and its subsidiaries

Created in 1946 by the Economic and Social Council of the United Nations (ECOSOC), the Commission on Human Rights is located in Geneva, Switzerland. It prepares reports, proposals, and recommendations on human rights in general, minority rights, and the prevention of all forms of discrimination.

Its Sub-Commission on Prevention of Discrimination and Protection of Minorities investigates such flagrant violations of human rights as policies of racial discrimination, segregation, or apartheid. This procedure, commonly known as procedure 1235, is open to certain non-governmental organizations. Individuals may have access to it only through an authorized non-governmental organization.

The sub-commission also receives petitions, called communications, about massive violations of rights through procedure 1503, which authorizes it to investigate. However, unlike procedure 1235, this process is almost entirely confidential. The sub-commission may refer the most serious cases to the Commission on Human Rights which may, in turn, decide to study the human rights situation and government practices in the state concerned.

A related organization specifically concerned with Aboriginal peoples' issues is the United Nations' Working Group on Indigenous Populations, created in 1982. It examines developments in the promotion and protection of the rights of indigenous peoples, paying particular attention to the evolution of standards for these rights, in order to express opinions on ways to improve relations between indigenous peoples and governments. The Working Group meets annually in Geneva. Although it hears presentations on Aboriginal rights, it may not examine complaints.

3. International Labour Organisation

The International Labour Organisation (ILO), established in 1919 and made a specialized U.N. agency in 1945, is a trilateral organization representing governments, employers, and employees.

The ILO has adopted a number of conventions on various labor issues: freedom of association, protection of women and children, protection against forced labor, and discrimination in the workplace. It also adopted two conventions about indigenous peoples: the Indigenous and Tribal Peoples

Convention, 1957 (ILO Convention no. 107), and its update, the Indigenous and Tribal Peoples Convention, 1989 (ILO Convention no. 169). However, neither convention provides for any petition mechanism, nor has Canada ratified either of the conventions.

Four procedures of representation and complaint are possible before the ILO, but the procedure established to allege a violation of the freedom of association is most commonly used, since it is the only procedure not requiring prior ratification of any of the ILO conventions dealing with freedom of association. Two organizations examine the complaints: the Committee on Freedom of Association, which receives complaints from workers' and employers' organizations, and the Fact Finding and Conciliation Commission on Freedom of Association, which deals with complaints referred to it by the governing body of the ILO or by the state concerned. The procedure may lead to recommendations to the state concerned.

4. United Nations Educational, Scientific, and Cultural Organization

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) is dedicated to the promotion of research and teaching of human rights. It receives petitions alleging the violation of rights of education, science, culture, and information, including the right to share in the cultural and religious life of the community, as well as the right to express oneself in the language of the community.

UNESCO declares inadmissible any petition based on political motives. It can be petitioned by an individual or a group of individuals who consider themselves victims of the alleged violations, or even by an individual or a group with knowledge of the violation, if they identify themselves. A simple letter to the general manager of UNESCO stating whether the author has brought the case before the national courts suffices.

UNESCO is not a court; it acts as a mediator for the parties and can only make recommendations to the government concerned. The procedure resembles the 1503 procedure mentioned above, however, it is less confidential since the author of a petition is informed of its outcome. Canada is a member of UNESCO.

5. U.N. Human Rights Committee

Established according to the International Covenant on Civil and Political Rights, the U.N. Human Rights Committee, located in Geneva, receives individual petitions against states that have ratified the Optional Protocol to the International Covenant on Civil and Political Rights.

The committee has already examined several petitions submitted by members of the First Nations of Canada, such as *Lovelace*, and the petition presented by the Lubicon Band.

In 1977, the U.N. Human Rights Committee found that Canada's Indian Act violated the right of Indian women married to non-Indians, and the right of the children of these women, to take part in the life of their community — a right guaranteed under the International Covenant on Civil and Political Rights. (At the time, marriage to a non-Indian led to the loss of Indian status for Native women and their children.) The recommendations of the U.N. Human Rights Committee were instrumental in the subsequent amendment of the Indian Act.

In 1990, the committee concluded that historical inequalities, as well as the treatment of the Lubicon Band (including Alberta's expropriation of band lands in order to lease them to private oil and gas companies), violated the International Covenant on Civil and Political Rights.

Petitions must be about violations of individual rights. Thus, the right to self-determination, deemed a collective right, cannot be petitioned for before the committee. However, a group of persons allegedly victims of the same individual

prejudice may petition the committee collectively. All remedies before national courts must be exhausted (see section **d.1.** below), and the petition must be signed by its author.

The petition is lodged by the victim, his or her representative, or a third person who must explain why he or she is acting on behalf of the victim and why he or she believes the victim is incapable of petitioning the committee but would approve of the initiative taken on his or her behalf. The petition must identify the victim, the state allegedly responsible for the violation, as well as the provisions of the International Covenant on Civil and Political Rights allegedly violated. It must also contain a detailed account of the violation. If the petition is declared admissible, it may lead to recommendations to the government concerned.

6. Inter-American Human Rights Commission

When Canada ratified the Charter of the Organization of American States (OAS), it became subject to the jurisdiction of the Inter-American Human Rights Commission, which oversees the application of the American Declaration of the Rights and Duties of Man in all the state members of the OAS. Unlike the Universal Declaration of Human Rights, which it is similar to in content, the American Declaration of the Rights and Duties of Man legally binds Canada. It is a unique international document that does not have to be ratified to become compulsory and, according to the Inter-American Court of Human Rights, it contains the human rights obligations of all members of the OAS. This means that any person, group of persons, or non-governmental organization recognized in an OAS member state that alleges the violation of a right guaranteed under the American Declaration may petition the Inter-American Human Rights Commission in Washington, D.C.

The procedure to petition the commission is simple. The complaint does not need to be lodged by the victim; it may be submitted by any person or non-governmental organization.

The petition must clearly identify the petitioner and, if possible, the victim, and must include a detailed account of the act or situation denounced. As in any international procedure, all the remedies available before the national courts must be exhausted and the petition must be lodged within six months of notification of the final judgment. If the petition is declared admissible, the commission will make recommendations to the government concerned.

An additional legal work protecting human rights is the American Convention on Human Rights and its supervisory institution, the Inter-American Court of Human Rights. Petitioners do not have direct access to the court. Instead, the Inter-American Commission forwards the complaint when states do not comply with the commission's recommendations. The court's judgment, having the same legal force as a Canadian court judgment, carries more weight than the recommendations of the commission. However, governments are not bound by the convention unless the state has ratified it. As well, the Inter-American Court's jurisdiction is not compulsory: states must recognize it. Canada has not yet done so, meaning petitions from Canada can go no further than the commission.

The only sanction Canada exposes itself to by not following the recommendations of the commission is the inclusion of its name, the facts of the case, and the conclusions of the commission in the commission's annual report to the OAS General Assembly. Nonetheless, the report's wide distribution publicizes the case and may help to put pressure on the government.

The Inter-American Commission also promotes respect for human rights in OAS member states through investigations of human rights situations in certain countries, on-site visits, and recommendations to the governments of member states. If it deems it necessary, the commission may also dedicate a special report to a particular situation or state.

In 1992, in collaboration with the Inter-American Indian Institute, the commission conducted a first round of consultations to prepare a draft Inter-American paper on the rights of indigenous peoples. The commission now awaits the comments of governments, Aboriginal organizations, and other interested institutions and experts. This draft may be obtained from the Inter-American Commission at the address below (see section f.).

d. HOW TO CHOOSE THE RIGHT FORUM

Since, as a rule, the same facts cannot be the basis of simultaneous actions before different international institutions, you must choose the appropriate forum. In the following pages, we have chosen to concentrate on the avenues that, in our opinion, are the most promising because they are based on legal works that bind Canada and protect a wide range of human rights. These are the U.N. Human Rights Committee and the Inter-American Commission. These two organizations also have the most public processes and are more likely to put pressure on the federal and provincial governments than the other forums.

1. Exhausting local remedies

The first step in choosing the right forum is to ensure that all remedies available under Canadian law have been exhausted. This means that the case has been tried by domestic courts and a final judgment rendered, leaving no possibility of appeal.

However, there are some exceptions to the rule. If, for example, the Supreme Court has already decided a similar issue and the outcome in the domestic courts can be anticipated, direct access to international forums is allowed. This was the situation in *Lovelace*, which was submitted directly to the U.N. Human Rights Committee in 1977 because the Supreme Court of Canada had already decided on a similar issue in 1974 and one could expect an identical response.

As well, in the Inter-American system, if the claimant lacks sufficient funds to avail herself or himself of domestic remedies and cannot obtain state assistance, the petition may be declared admissible, if the other conditions are met.

2. Identifying the appropriate legal work and institution

You must also identify the right that was infringed and the international works protecting it, to which Canada is a party. Canada is bound by a number of international legal works protecting human rights, but not all allow for individual petitions. As well, Canada must recognize the jurisdiction of an institution authorized to hear individual petitions in order for you to petition that institution. A complete list of treaties in force in Canada may be obtained from the Treaty Registrar in Ottawa (Tel: 613-995-3130).

Usually, your choice is between the U.N. Human Rights Committee and the Inter-American Commission. However, this also depends on who is petitioning and the time involved. As well, your choice of forum to petition may be influenced by previous decisions of the institutions. Both the Inter-American Commission and the U.N. Human Rights Committee have heard petitions raising Aboriginal issues.

The U.N. Human Rights Committee hears petitions alleging violations of the International Covenant on Civil and Political Rights. The Committee Against Torture, a section of the U.N. Centre for Human Rights, hears communications about violations of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Inter-American Commission, for the moment, hears petitions from Canada alleging violations only of the American Declaration of the Rights and Duties of Man.

3. The petitioner

If the petitioner is the victim, he or she can choose either the Inter-American Commission or the U.N. Human Rights

Committee. However, if the petitioner is someone other than the victim, the choice is limited. Any person or group of persons, whatever their age and nationality, may petition the Inter-American Commission whether they are themselves victims of the violations or whether they act on behalf of the victim or on their own behalf, if they have sufficient knowledge of the violation.

On the other hand, the U.N. Human Rights Committee will accept a complaint only if the petitioner is the victim or the victim's representative who can establish close ties with the victim. Mere knowledge of the violation is insufficient.

Of course, the victim's freedom of choice must be protected. If the victim decides to petition the U.N. Human Rights Committee, for example, the Inter-American Commission would refuse to hear a petition based on the same facts presented by a third party or a non-governmental organization because, as a rule, it does not hear petitions that are already being examined by another governmental organization. In other words, it is only if the victim is unable or unwilling to petition the Inter-American Commission and is not petitioning another institution that a third party may do so.

4. The time frame

A petition to the Inter-American Human Rights Commission must be made within six months of the date of the final judgment from a national court unless internal remedies cannot be exhausted, in which case the petition must be addressed within a reasonable period of time.

On the other hand, the U.N. Human Rights Committee requires only that it be petitioned within a "reasonable" period of time. There is no specific time frame, nor is there a precise definition of what is a reasonable period of time. We can only assume that the time period may vary according to factors such as the severity of the violation alleged, the availability of information on the international complaint procedures, or the

difficulties in taking advantage of the available procedures, according to the circumstances of each specific case.

When choosing which forum you will petition, keep in mind that it is not possible to petition the Inter-American Commission after the U.N. Human Rights Committee has finished examining the case and made recommendations that prove unsatisfactory, principally because of the commission's six-month deadline. However, the U.N. Human Rights Committee has, in the past, agreed to examine cases already examined by the Inter-American Commission.

e. THE CONSEQUENCES OF THE ACTION TAKEN

As we mentioned earlier, the petitions most likely to put pressure on the Canadian government are those to the U.N. Human Rights Committee or the Inter-American Commission. Whatever the choice, all the avenues suggested above — including the U.N. Human Rights Commission, UNESCO, and the ILO — may lead to recommendations, but not judgments. The situation will be different when Canada ratifies the American Convention on Human Rights and recognizes the rights of the Inter-American Court of Human Rights to hear individual cases. Then individuals will receive a judgment which has binding force on Canada. Until the convention is ratified, however, the binding nature of the outcome should not be a deciding factor in your choice of forum.

Canada has a number of international obligations holding the Canadian government accountable to the international community. Canada is also actively participating in the drafting of specific international legal works recognizing and protecting Aboriginal peoples and rights. If negotiations or litigation do not lead to a satisfactory resolution, full use should be made of international recourses. It is important that the voices of Aboriginal peoples be heard, both at the United Nations and the OAS. The United Nations, through the Working Group on Indigenous Populations, as well as through the working group set up by the U.N. Commission

on Human Rights to study the U.N. Draft Declaration on the Rights of Indigenous Peoples, encourages Aboriginal participation. Although participation at the OAS is more difficult in the absence of an equivalent of the Working Group and because non-governmental organizations have no status, written briefs may be submitted to the Inter-American Human Rights Commission.

f. ADDRESSES

You may contact the agencies described above at the following addresses:

Commission on Human Rights

U.N. Human Rights Committee
U.N. Centre for Human Rights
United Nations Office in Geneva
Palais des Nations
CH-1211 Geneva 10
Switzerland
Tel.: (41)(22) 917-1234
Fax: (41)(22) 917-0123

Committee Against Torture

Secretary of the Committee against Torture
U.N. Centre for Human Rights
United Nations Office in Geneva
Palais des Nations
CH-1211 Geneva 10
Switzerland
Tel.: (41)(22) 917-1234
FAX: (41)(22) 917-0099

International Labour Organisation

ILO Governing Body
Committee on Freedom of Association
4, route des Morillons
CH-1211 Geneva 22
Switzerland
Tel.: (41)(22) 798-7707
Fax: (41)(22) 798-8685

UNESCO

Director of International Legal Standards and Legal Affairs
UNESCO
7, Place de Fontenoy
F-75700 Paris
France
Tel.: (33)(1) 45-68-10-00
Fax: (33)(1) 47-83-40-24

Inter-American Human Rights Commission

c/o Organization of American States
1889 F Street NW, 8th Floor
Washington D.C. 20006
Tel.: (202) 458-6002
Fax: (202) 458-3992